No. 2838

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

F. G. NOYES, as Receiver of the Washington-Alaska Bank, a corporation organized under the laws of the State of Washington,

Plaintiff in Error,

v.

W. H. PARSONS and JANE DOE PARSONS, his wife,
FALCON JOSLIN and JANE DOE JOSLIN, his wife,
JOHN SCHRAM and JANE DOE SCHRAM, his wife,
E. L. WEBSTER and JANE DOE WEBSTER, his wife,
J. W. CLISE and JANE DOE CLISE, his wife,
F. E. BARBOUR and JANE DOE BARBOUR, his wife,
and WASHINGTON SECURITIES COMPANY, a corporation,

Defendants in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

REPLY BRIEF OF PLAINTIFF IN ERROR

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Defendants in error devote most of the part of their brief dealing with the cause of action to insisting that the three conspiracies—that of 1905, that of May, 1909, and that of September, 1909—are in reality but one conspiracy, and say the complaint itself so asserts.

Whether there Were Three Conspiracies or One Is a Question of Law for this Court to Decide from the Allegations of Fact in the Complaint, Independently of Any Conclusion of Law Drawn by the Pleader.

It is immaterial what conclusion of law the pleader, in framing the complaint, may have arrived at on this question of one or three conspiracies. The question is whether the *facts* set up constitute three conspiracies or one. That is for this Court to determine, not for the pleader. Whether any conspiracy at all is alleged is a matter of law, and whether the facts alleged constitute three conspiracies or one is also necessarily a matter of law.

Let us look at some of those facts. Greenleaf, in dealing with the evidence of conspiracy (3 Greenleaf on Ev. (15th ed.), § 93) says "the common design is the *essence* of the charge." This must mean the concrete design common to the conspirators, not a design common to several conspiracies. A design is a plan; a plan is not for the attainment of some abstract purpose,—e. g., the restraint of trade,—by some abstract means, i. e., *some* restriction *or other* on the banking business. A conspiracy is a design (a) by *certain* conspirators (b) to do *certain* acts (c) in certain, *definite* ways (d) for the attainment of a certain, precise and *definite* object, and (e) having a certain result if carried out. In other words, these elements are all concrete. To substitute for the elements in this statement the facts of the conspiracy of 1905 and the facts of the conspiracy of September, 1909: The conspiracy of 1905 was a design (a) on the part of the three banks and their

boards of directors (b) to fix certain high rates and charges for services to customers (c) by means of the contractual concurrence therein by all three of the banks (d) so that each of the banks could make more money than it otherwise would, (e) resulting in the fettering and controlling of the banking business at Fairbanks and environs, leaving, however, each of the three banks still in existence and undominated by the others and free to engage in said banking business and to compete for business against the others, though under the restrictions of the said contract. The elements of the conspiracy of September, 1909, were in several respects very different indeed from those of the conspiracy of 1905: The conspiracy of September, 1909, was a design (a) on the part of one bank (the Nevada Company) and its directors and the stockholders of another bank (the Washington Company)—not as stockholders but as individuals—(b) to throw the Washington Company entirely into the control of the Nevada Company, (c) by means of a transfer of the stock of all the stockholders of the Washington Company to the Nevada Company and the substitution of dummy directors by the Nevada Company for the legal directors of the Washington Company, (d) so that the Nevada Company and the stockholders of the Washington Company — not *as* stockholders but in their personal capacities—could make more money or "quicker" money, (e) resulting in the fettering and controlling of the banking business at Fairbanks and environs by eliminating the

Washington Company, and resulting also, incidentally, in the loss of its assets by the Washington Company (for which loss we herein sue).

So we say that these conspiracies are, as a matter of law, different. Without repeating the details of the conspiracy of May, 1909, that is as distinct from the conspiracies of 1905 and September, 1909, as the latter two conspiracies are distinct from each other.

It Is Not Necessary that the Statement of the Gist of the Action, Apart from the Matter of Inducement, Should Set Forth a Cause of Action; It Is Sufficient if Gist and Inducement, Construed Together, State a Cause of Action; Moreover, the Complaint, in Its Statement of the Gist Alone, Charges a Violation of the Sherman Act.

The defendants assert that unless the conspiracy of 1905 is relied upon by the plaintiff, the complaint alleges no conspiracy in violation of the Sherman Act. We can think of but two possible meanings which could have been intended by this statement. If defendants mean (1) that if the matter of inducement be eliminated the remainder of the complaint must in itself state a cause of action or the complaint is bad, the assertion is unfounded in and contrary to the rules of correct pleading. If they mean, to use their own words, (2) that paragraph XV and subsequent paragraphs "contain no allegation of a combination or conspiracy that in any degree tended to restrain trade or commerce," their position is equally untenable, for the *necessary* effect of the elimination of one of the banks through

its wrongful absorption by another bank was to limit and restrict, throttle and control the business of banking in Fairbanks and environs further and more than was the fact prior to the formation and execution of the conspiracy of September, 1909. Let us consider these two propositions.

As to the question of pleading. Usually a complaint in which there is matter of inducement would fail to state a cause of action if the inducement matter were stricken out and only the allegations constituting the gist of the action were left. (See Bliss on Code Pleading (2d ed.), §§ 149, 150.)

The complaint herein could undoubtedly have omitted all mention of the conspiracies of 1905 and May, 1909, and have detailed the facts of the conspiracy of September, 1909, just as they are now detailed in the complaint but adding thereto fuller allegations of the purpose and intent with which the last conspiracy was entered upon and consummated; namely, to destroy the Washington Company and thereby to cast the banking business wholly into the hands of the Nevada Company and thus to restrain trade. Possibly that would have been better pleading. Certainly it would have been the statement of a cause of action. The fact that the complaint would thus have stated a cause of action is itself proof that the conspiracy of September, 1909, was a separate and distinct conspiracy from the two prior ones. Instead of drawing the complaint in that way the pleader set up as inducement the prior conspiracies so as to exhibit by the narration of their pre-

vious conduct (instead of by bare allegation of their intention) what was the intention and purpose of the defendants in the transaction of September, 1909, and later.

As to the necessary effect of the acts of the defendants set up in paragraph XV and subsequent paragraphs, and as to whether those paragraphs state facts constituting a violation of the Sherman Act. It is clear that the necessary, natural and direct tendency of the conspiracy of September, 1909, was to suppress every remaining vestige of competition and to concentrate and unite in one hand the whole banking business at Fairbanks and environs. Where such is the natural, necessary and direct tendency of an agreement, combination or conspiracy in a Territory the Sherman Act is violated. (See cases cited on page 71 of our opening brief.) Such was not only the tendency here, but the actual result.

As to whether a contract or combination is in restraint of trade the intention actuating the parties is material only in doubtful cases. The Supreme Court of the United States, speaking by Mr. Justice Lurton, in *United States v. Reading Company* (the anthracite coal cases), 226 U. S. 324, 370, said:

> "Whether a particular act, contract or agreement was a reasonable and normal method in furtherance of trade and commerce may, in doubtful cases, turn upon the intent to be inferred from the extent of the control thereby secured over the commerce affected, as well as by the method which was used. Of course, if the necessary result is materially to restrain trade

> between the States, the intent with which the thing was done *is of no consequence.* But when there is only a probability, the intent to produce the consequences may become important. *United States v. St. Louis Terminal Association,* 224 U. S. 383, 394; *Swift & Co. v. United States,* 196 U. S. 375."

But this is not a doubtful case. The natural, necessary and direct result of the act of the defendants in selling their stock to the Nevada Company speaks for itself. It shows what their intent must have been. But if it were a doubtful case, the complaint charges in paragraph XV (tr. p. 24) that the purpose was to effect the absolute concentration and control of the banking business in the hands of the Nevada Company, and that it was the intention of the defendants to bring about the results which actually ensued — a still further suppression of competition by elimination of the Washington Company. In addition to the cases cited on page 71 of our opening brief, see:

> *Swift and Co. v. United States,* 196 U. S. 375, 396, 398;
>
> *United States v. Joint Traffic Association,* 171 U. S. 505, 568.

So we submit that the objection of the defendants, that if the complaint sets up two conspiracies as inducement and a third as the gist of the action it alleges no violation of the Sherman Act, is not well taken, either as a matter of pleading or as a matter of substance.

A Corporation Is More Than and Different from a Mere Voluntary Association of Persons.

In their brief, page 46, defendants say that "the corporate entity * * * is but the association of these stockholders," and on page 28 they say, "a corporation outside of and beyond the constituent body of its stockholders is nothing. The corporation is its stockholders working together in unison and for certain purposes by agreement among themselves * * *. This union of its stockholders for definite purposes is the corporate entity." Substituting "members" for "stockholders" and "association" for "corporation," this becomes a good description of a voluntary association of persons. But it falls far short of being an accurate description of a corporation. The exigencies of their position drive defendants throughout their brief to assume that a corporation is no more than an *unincorporated* association of persons. It is only so that they can maintain the identity of corporation and stockholders. To admit that a corporation is an entity separate and apart from its stockholders is fatal to their demurrer.

A Corporation Has a Right of Action Against the Whole Body of Its Stockholders for Damages Arising From the Wrongful and Fraudulent Manner in Which They Have Managed Its Business.

At various points in their brief defendants speak of the stock transfer of September, 1909, as "the management of the business" of the Washington Company—an evident fallacy. That transaction

was the private business of the defendants, conducted for their private gain. But assuming that it were corporate business their proposition is wholly unsound. It is utterly refuted by the case of *German Corporation of Negaunee v. Negaunee German Aid Society,* 172 Mich. 650, 138 N. W. 343, 345. There a corporation (the Aid Society) was organized exclusively for benevolent purposes and could own and dispose of property for such purposes only. By devise from one of its members it acquired title to some land which contained mineral values. All of the members of the corporation consenting thereto and causing the same, the corporation executed a deed to that land to *all* of its members in equal undivided interests. These members organized a mining corporation (the German Corporation) and deeded the land to it. The Aid Society later took in new members; these new members questioned the legality of the transactions, just described, and the mining company sued them and the Aid Society to quiet its title. The new members disclaimed title, but being in control of the offices of the Aid Society, caused the latter corporation to defend and to file a cross-bill to quiet *its* title. The prayer of the cross-bill was granted. The Court said:

> "The Aid Society was not really a party to the deed of the mineral rights. Every officer and member of the society was interested on the other side. The officers and members represented themselves. The corporation of which they were officers and members was not represented in the transaction. The officers and members dictated the terms of the sale, directed the

execution of the deed, executed it themselves, and delivered it to themselves. The deed, therefore, was not, either in law or fact, executed or delivered by the society to its officers and members, but by its officers and members to themselves. The deed to the old members must be held void, because made upon inadequate consideration by and for the benefit of those in control of the corporation, and also for want of the necessary element of two parties to the contract. Miner v. Ice Co., 93 Mich. 97 (53 N. W. 218, 17 L. R. A. 412); People v. Township Board, 11 Mich. 222; Railway v. Dewey, 14 Mich. 477.

"* * * The position taken by complainant that, inasmuch as all of the officers and members of the society, at the date of the transaction, were parties to it, neither the corporation nor the new members will be admitted to complain, is unsound. Clark & Marshall on Private Corporations, p. 2297, and cases collected in note 565.

"A corporation is a legal entity and artificial person distinct from its stockholders or members as individuals, and that it may, by a proper action, in the proper court, recover property owned by it, which is unlawfully withheld by its officers and members in control of its affairs, is entirely clear, *and the fact that all of its members happened to be in opposition does not alter the case.* In such a situation a corporation may sometimes be unable to get into court, but being in *it may demand of all of its members,* as well as of a part, the restitution of property unlawfully appropriated."

This Michigan case, we submit, effectually disposes of much of defendants' brief. It disposes of the statement on page 33 thereof:

"To say that the corporation as such has in its right a cause of action against the whole

> body of its own stockholders for damages arising from the manner in which the whole body of its stockholders has managed its business is to state a moral, legal and physical impossibility."

It disposes effectually of this statement on page 37 thereof:

> "What they [the courts] have said, and what is the only rule that comports with the obvious truth, is that they will recognize the fact that the corporation has no rights beyond or antagonistic to the whole body of its constituent members. * * * it would be a gross wrong to permit a corporation by its receiver, to recover from its stockholders treble damages for corporate management that all the stockholders consented to."

It disposes of defendants' statement on page 34 of their brief:

> "* * * if all of the shareholders of a corporation should join in a deed of corporate lands and should turn the possession over to the grantee who should commit waste, we apprehend that the corporate entity could not maintain a right of action in tort against all its stockholders for such a transaction."

We apprehend that the corporate entity *could* maintain an action in tort against all its stockholders for such a transaction if the commission of waste by the grantee was the natural consequence to be expected from the making of the deed and the surrendering of possession to him. It is said by defendants (their brief, p. 35) that "Even though the deed might not pass title it would support an ac-

tion for specific performance," and two cases are cited to this proposition. The first one, *Anderson v. Wallace Lumber & Mfg. Co.,* 30 Wash. 147, does not bear on the point at all; there a written memorandum of sale and purchase was signed by the officers and three out of four trustees actively participated in the transaction, and specific performance was decreed. The other case, *Bundy v. Iron Co.,* 38 Oh. St. 301, was a suit to foreclose a mortgage, and the decree amounted to the reformation of an instrument and the enforcement of it in the same suit; the corporation had received and used the money and had promised to execute a mortgage; by mistake the mortgage was executed in the names of the stockholders; the case was, of course, in equity, and if it has any bearing on the principles here involved it falls within the exceptions mentioned in our opening brief, that is, the stockholders were considered as identical with the corporation in order to prevent a wrong.

The contention of defendants that a corporation is identical with the whole body of its stockholders may be represented as an equation in mathematics: the corporation=all stockholders of the corporation. Then, if it is a true equation, the converse must be true: all the stockholders=the corporation. But this is untrue in law, as our opening brief, pages 23 to 28, points out. (See also *Tapscott v. Mexican Colorado River Land Co.,* 153 Cal. 664, 96 Pac. 271.)

The Corporation Did Not Act in the Transaction of September, 1909, but if It Had Acted Therein It Could Still Recover Against These Defendants.

Defendants say (their brief, p. 4) that the Washington Company was a party to the contract and conspiracy of September, 1909:

> "It is claimed by the plaintiff that the Washington bank, having suffered damage by this conspiracy, *to which it was a party through the action of all its stockholders,* has a right of action against its stockholders for such damage, and that the plaintiff, as its receiver, has succeeded to that right of action."

And they assert that because it was a party to that conspiracy it cannot recover herein. But yet they admit (their brief, pp. 33-34) that if a majority of the stockholders do a wrongful act injuring the corporation, the corporation can recover against them. And we suppose they would admit the well-established principle that if the directors, *by action as a board, and therefore by corporate action,* defraud the corporation, the corporation can recover against such directors as soon as it gets into such hands that it can sue; or a stockholder, *suing in its behalf,* can recover for it. Yet in such case the corporation, *by corporate action,* has done the very thing by which it complains it was injured. Such were the cases cited and discussed on pages 49 to 58 of our opening brief. Those cases flatly hold that where a corporation has been thrust by those controlling it into wrongful action, through which it sustains injury, it has a right of action against

them. None of those cases was in right of creditors. They were all suits in right of the corporation itself. That is true of *Hayes v. Kenyon,* 7 R. I. 136, no less than of the others, notwithstanding the statement to the contrary in the defendants' brief, as a careful reading of the case in full will disclose. This right of recovery exists and applies not only against directors and officers, as said cases show, but against "the whole body of the stockholders," as the Michigan case involving the German Aid Society, heretofore discussed, amply demonstrates.

Most of These Defendants Are Also Charged as Directors with Violating the Sherman Act.

The defendants dwell with emphasis upon the fact that they are charged as stockholders, but seem not to notice that most of them are charged also as directors. The individual defendants who were directors of the Washington Company and who stepped out of office to make room for the dummy appointees of the Nevada Company, all in pursuance of the conspiracy of September, 1909, in restraint of trade, (paragraph XX of the complaint, tr. pp. 35-36), are guilty of violating their trust as directors and of making it possible for the Nevada Company to despoil the Washington Company. If they had continued to discharge the duties of their office according to their legal obligations there could have been no execution of the conspiracy in restraint of trade, notwithstanding the stock transaction. By violating that duty they, *as directors,*

participated in the conspiracy, and they are therefore liable to the Washington Company for losses traceable to their wrongful conduct in surrendering their places to the dummy appointees of the Nevada Company. It cannot be said that by their said surrender of the directorate the Washington Company itself participated in the conspiracy. On this point the ruling in *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.,* 166 Fed. 254, 261, is clear. (See quotation therefrom on pages 55-56 of our opening brief.) Hence, not only are all of the defendants liable in this action because they turned their stock over to the Nevada Company, but defendants Schram, Clise, Joslin, Parsons and Webster are liable to the Washington Company herein for the damages it sustained through their surrender of the directorate. (Paragraph VII of the complaint, tr. pp. 5-6.)

This Action Is Directly in Right of the Corporation and Indirectly in Behalf of Whomsoever Is Entitled to Payment From Its Funds.

Defendants insist that because this action is in right of the corporation, the fact that there are unpaid creditors in a very large sum must not be considered by this Court. But inconsistently they say that if a single stockholder's interests had been damaged, the corporation could recover herein; inconsistently, because they admit, by citing *Loeb v. Eastman Kodak Co.,* 183 Fed. 704, that such stockholder would himself have no right of action for the indirect injury done him through an injury to the

corporation, but that the right of action would be in the corporation alone. The interests of both stockholders and creditors in any recovery herein are indirect. Then why, since neither could maintain this action, can the corporation recover when a stockholder is indirectly injured but cannot recover when creditors are indirectly injured? This Court is no more bound to exclude from its view the fact that there are creditors who are indirectly injured by the acts of these defendants in violation of the Sherman Law and injurious to the Washington Company, than it would be bound to shut its eyes to the indirect injury to a stockholder by such acts. Indeed, creditors' rights rank ahead of those of stockholders, whether the corporation be solvent or insolvent: if solvent, the corporation has no right to divide its capital or any part of it among its stockholders before its debts have been paid; if insolvent, its creditors must be paid before distributing the residue to the stockholders.

The fact should not be lost sight of, that this is not an action for dissolution of the Washington Company. Its estate is being administered because it is insolvent. But if it recovers herein it can pay its debts and have a surplus with which to transact business. Is the fact that these defendants are its stockholders, that it has been reduced to its present desperate condition by *their* acts, any argument against its right to be restored to its property and to solvency and to the ability to pay its debts and to resume business? We cannot see that it is.

There Is No Respectable Authority at Law Holding that a Corporation May Not Sue All Its Stockholders.

The defendants confess that they have been unable to find "many cases" supporting their proposition that a corporation cannot sue all its stockholders. They cite but two which they claim support their position, *Hayes v. Parsons,* 14 Abbott N. C. (N. Y.) 419, and *Arkansas River Land etc. Co. v. Farmers' Loan & Trust Co.,* 13 Colo. 587, 22 Pac. 954.

Hayes v. Parsons was decided by an inferior court, namely, by the New York Superior Court, General Term. The Court was composed of three judges; one dissented, the second, Judge Ingraham, concurred in only a very small part of what Judge Sedgwick said. Judge Ingraham's concurrence, a brief paragraph on page 435, shows that the actual decision of the Court was that where A receives his stock in exchange for overvalued property, and B, with notice of the overvaluation and of the whole transaction, takes the stock by assignment from A thereafter, B cannot maintain an action for damages against the directors who issued the stock because he stands in A's shoes. Judge Sedgwick's opinion is characterized by self-contradictory reasoning and statements. Thus, he says, page 430, "It is true that the corporation is something more than its trustees and stockholders;" and on page 431 he says that the trustees are the corporation, and also that the stockholders are the corporation. So, in

his opinion, we have all possible views presented; namely, (1) a corporation is separate and distinct from its shareholders, (2) it is its shareholders, (3) it is its trustees.

But the really interesting feature connected with the report of this case is the note of Mr. Abbott thereunder, which discloses that he included the case in his collection for the purpose of showing how wrong are some of the statements in Judge Sedgwick's opinion. At page 437 Mr. Abbott gives the ruling in *Nott v. Clews,* made by a higher court, namely, the Supreme Court of New York, one month after *Hayes v. Parsons* was decided. That ruling was directly contra to the dicta of Judge Sedgwick on which defendants rely. But more interesting still is the citation by Mr. Abbott, at page 442, of *The Society etc. v. Abbott,* 2 Beav. 559, 567, a case directly contra to the dicta of Judge Sedgwick. In that case the Master of the Rolls, Lord Langdale, said:

> "A great deal of confusion has almost unavoidably arisen in the course of the argument, by not distinguishing the corporation or corporate body from the individual persons, who at one time seem to have constituted *not the corporation, but all the members of the corporation* (see Bligh v. Brent, 2 Younge & C. 295). Unless such a distinction be observed, it would be impossible to come to anything like a satisfactory conclusion upon this occasion. * * * Now it is distinctly stated in this bill, *that the only persons who were at that time interested, were the four persons named.* That, being so, *it is alleged in argument, that they had the right*

> *to do what they pleased* with respect to that which was to become the property of this corporation, that is, in respect of these shares; and that if, on the one hand, they had the power of incurring responsibility, they had, on the other hand, the power in that way of discharging themselves from it. I confess I cannot concur in that argument."

And the case by the corporation against all of its stockholders was entertained by the Court.

Arkansas River Land etc. Co. v. Farmers' Loan & Trust Co., the other case cited by the defendants, is no better than their New York case. All of the excerpt which they give in their brief is dictum, for the Court decided that there was no party plaintiff in the case; the individuals had no standing as plaintiffs because the Court held that they were not stockholders; not being stockholders, they were not directors, and were therefore without power to represent the corporation and make it a party plaintiff as they had attempted to do. (See 22 Pac. 958, 959.) But if the matter quoted by defendants were not mere dictum the case would still be without value to them, for it was in equity and falls within the exceptions mentioned in our opening brief, pages 29-30: To prevent fraud and wrong the corporation was said by the Court to be bound by the engagements of its promoters and stockholders — the corporation had received and accepted the benefit of contracts and expenditures under arrangements made by its stockholders and the Court said it should not be allowed to disavow them.

To Prevent the Running of the Statute of Limitations Only One Fraud Is Required, Not Two, Though Here There Were Two Frauds.

The defendants admit that the stock transaction of September, 1909, was a fraud on the Washington Company, but say that the subdivision of the Washington statute of limitations relative to fraud does not apply, and the statute of limitations was not tolled, because there was not a second and subsequent fraud concealing this first fraud. There is no warrant in law for the proposition of defendants (their brief, pp. 50-51, 60) that to prevent the running of the statute of limitations, and to make subdivision 4 of section 159 of the Washington statute applicable, there must be *two* frauds, (a) the original fraud and (b) the fraud of concealing said original fraud. If defendants were correct, how would they account for that large class of cases of which *Bailey v. Glover,* 21 Wall. 342, is the type, where the fraud is of such nature that it conceals itself? Surely in that class of cases there is no subsequent or second fraud designed and practiced to conceal the first, for by the very supposition the fraud *conceals itself.* But in the cases of fraud concealed by the defendants, instead of by itself, such concealment is not necessarily a separate and independent fraud. It may be but part and parcel of the general original fraud. As Pomeroy says (§ 917, note 2) in his work on Equity Jurisprudence:

> "It has sometimes been said that *actual concealment* is necessary, and that the mere fact of non-discovery is not enough. This cannot mean

> * * * that the fraudulent party must *necessarily* have used some affirmative means to cover up his acts." (The italics are the author's.)

But were the law just as defendants claim—were two frauds necessary—they exist in this case and are alleged in the complaint; to-wit, (a) the fraud of the sale of defendants' stock with the purpose of concentrating the banking business in the hands of the Nevada Company and of despoiling the Washington Company, and with that result, and (b) the pretended consolidation and merger by means of moving the Washington Company's effects into the Nevada Company's office, the false announcement of a merger made by defendants and the Nevada Company, the dropping of the name "Fairbanks Banking Company" by the Nevada Company and its assumption of the Washington Company's name, "Washington-Alaska Bank," and the subsequent conduct of the business of the two banks as that apparently of one consolidated concern—all by the *knowledge, consent, approval,* and *arrangement* of the *defendants* as much as by the acts and consent of the Nevada Company, and all with the intention of deceiving everybody concerned or interested in knowing the true facts, and with that result. If this was not a second fraud intended and calculated to conceal the first one, and actually so operating at all times until 1915, then certainly no instance of such second fraud concealing a first fraud can be found in the books or can exist.

But, though as to the creditors the first fraud was concealed by the "second" fraud (and the two frauds were together of such nature as naturally to conceal themselves, as we have pointed out in our opening brief), yet the vital question is solely when and how it should become possible for the Washington Company to institute action against these defendants; for the action is in its right. The obtaining of notice or knowledge by creditors could only be the *occasion* or *incident* from which relief might result to the Washington Company. Such relief could not come until some person or functionary was appointed and given power to act in behalf of the Washington Company. In *Yeiser v. United States Board & Paper Co.,* 107 Fed. 340, 344, 345, the Circuit Court of Appeals, Sixth Circuit, said, after speaking of the trust relation between promoter and corporation and of the duty of full disclosure and good faith:

> "Of course, these observations do not apply to a case where the corporation, having knowledge of the facts *and freedom of action,* consents to a contract proposed by another, even though he may be a stockholder or a director. The corporation could not in such case complain, nor could a stockholder, if there had been no actually fraudulent purpose towards him.
>
> * * *
>
> "When, on August 3, 1896, Browne and Stuart made their proposition to sell the mill to their company, and they and their co-operating associates, acting as the board of directors, accepted it for the company, the company was completely in fetters. While it was made to be a purchaser, it was dominated by the seller. It

> had no organ for seeing, hearing, or even knowing what was going on. Its whole constituency was engaged in bringing about the sale for the sellers. We have, on several occasions, held that where one who assumes to act as the agent of another in a given transaction is really acting as the agent of a third person, or in behalf of some scheme of his own, his apparent principal, having no knowledge of such alien purpose, is not bound by such pretended agent's acts, nor by any notice or knowledge of facts which such agent had at the time the transaction was going forward. Thompson-Houston Electric Co. v. Capital Electric Co., 12 C. C. A. 643, 65 Fed. 341; Wilson v. Pauly, 18 C. C. A. 475, 72 Fed. 129, 134; Louisville Trust Co. v. Louisville, N. A. & C. R. Co., 22 C. C. A. 378, 75 Fed. 433, 469. And see Surety Co. v. Pauly, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977; Innerarity v. Bank, 139 Mass. 332, 1 N. E. 282. *This rule is supported by still stronger reasons where the principal is in such condition that it can by no possibility either learn the facts or have any judgment to form its own course with regard to them.*"

The cases cited on pages 53 to 60 of defendants' brief may all be good law, but we respectfully submit that they have no application to the facts of this case.

Defendants say it is absurd to assert that if no receiver had ever been appointed for the Washington Company the statute of limitations would never have run against this action. If it is absurd the defendants have only themselves and the legislature to blame, not the plaintiff, for the defendants are the authors of the fraud and the legislature is the author of the statute which prevents the run-

ning of time until the fraud is discovered by and in behalf of the party injured. Here it could be so discovered in no other way than by a receiver.

The whole argument of the defendants, on pages 46 to 51 of their brief, where they confuse physical power to get into court with the right to sue, is answered by the Michigan case of *German Corporation of Negaunee v. Negaunee German Aid Society,* 172 Mich. 650, 138 N. W. 343.

The Fact that the Laws of Nevada Do Not Permit Consolidation of a Corporation of that State with One of Another State Has an Indirect Bearing on the Running of the Statute of Limitations in This Case.

Defendants say, on page 61 of the their brief, "Whether the laws of Nevada * * * forbid * * * the consolidation is not involved in this appeal." In order that there may be a consolidation of corporations there must, of course, be a statute permitting it. There is and has been no such statute in Nevada. What is not permitted is, as to consolidation, prohibited. The laws of Nevada, which in effect prohibit consolidation, are not involved in this case so far as the cause of action is concerned; that depends entirely on the federal anti-trust law. But as to the running of the statute of limitations the matter is different. As to that the law of Nevada is involved. As we have said repeatedly, the only way relief *could* come, under the circumstances, was through action initiated by some creditor of the Washington Company, and it was

only when some creditor should learn that there was no consolidation (because there could not have been a legal or actual consolidation, since it was not permitted by the laws of Nevada) that such creditor would move in the Washington Company's behalf (because such move would be in his own behalf); for when the creditor obtained *that* information he would see that the administration of the affairs of "the Washington-Alaska Bank," commenced in January, 1911, was really the administration of the affairs of the Nevada Company, and not at all the administration of the assets of the Washington Company. The central question is, when the corporation could be affected with notice. That depended on the appointment of a receiver. That in turn depended on initiation of an action by a creditor. That in turn depended on such creditor acquiring knowledge that there had been no consolidation, and that there was therefore as yet no adminstration of the affairs of the Washington Company. That in turn depended on such creditor acquiring knowledge that the laws of Nevada did not permit such consolidation, and therefore that consolidation could not have occurred. In that way and to that extent the laws of Nevada, not permitting the consolidation, are involved in this appeal. The defendants represented by words and acts that the laws of Nevada permitted the consolidation of the two banks. Not till some one interested as a creditor discovered the falsity of that representation (which was a representation of fact, being matter of for-

eign law) could relief for the Washington Company be expected or, indeed, be possible.

We respectfully submit that the judgment of the lower Court should be reversed.

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